A

## PUBLIC BANK BHD

v.

## LIM KIM HUAT

B

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL APPEAL NO: 12-524-03]
12 JANUARY 2009

C ***CIVIL PROCEDURE:*** *Costs - Bill of costs - Stage of proceedings at which costs to be dealt with - Whether to be taxed after substantive appeal - Discretion of court - Rules of the High Court 1980, O. 59 r. 4(1)*

D This was an appeal by the respondent/defendant ('the defendant') against the decision of the learned senior assistant registrar ('SAR') allowing with costs the preliminary objection of the appellant/ plaintiff ('the plaintiff') and ordering that both the defendant's bill of costs ('the bill of costs') be taxed after the substantive appeal. They pertained to costs awarded to the defendant by the deputy E registrar on two applications (encls.17 and 21). The plaintiff had filed encl.17 for an *inter partes* hearing to set aside the writ of seizure and sale dated 15 February 2006 and for other ancillary relief. The defendant had filed encl. 21 to set aside the interim court order dated 16 March 2006 obtained *ex parte* by the plaintiff F staying the execution of the writ of seizure and sale dated 15 February 2006. The plaintiff's encl. 17 was dismissed with costs and the defendant's encl. 21 was allowed with costs. Both applications relate to execution of an order where stay of execution of a final judgment after a retrial had been refused. The G plaintiff's preliminary objection was that there was non-compliance of O. 59 r. 4(1) of the Rules of the High Court 1980 ('the RHC') in that (i) the notice of appeal to a judge in chambers had not been heard ('the substantive appeal'); (ii) the bill of costs could not be fixed for taxation at this stage because the court did not H order for the costs 'to be paid forthwith'; (iii) that the application for stay of execution of the Sessions Court judgment after retrial in the High Court which was dismissed with costs was made *vide* a summons in chambers and was therefore an interlocutory appeal. I It was the defendant's contention that the application for stay of

execution of the Sessions Court judgment after retrial in the High Court should have been made soon after the application was dismissed and the application 'would have been by way of an originating motion'. According to the defendant, encls. 17 and 21 were not 'interlocutory' as they were applications after a final judgment where the commence action had ended. The issue that arose was whether the costs of encls. 17 and 21 were taxable immediately or should be taxed and paid at the end of the substantive appeal.

**Held (dismissing the appeal; affirming the decision of the Senior Assistant Registrar in allowing preliminary objection):**

**(1)** Since there was no procedure specified as to how an application was to be made after there was a refusal from the subordinate court, the plaintiff had an option whether to move by way of originating motion (OM) or by way of a summons in chambers. As was correctly submitted in this case, the plaintiff had chosen to proceed by a summons in chambers and since it was an application for stay of execution made under the main appeal, it was an interlocutory appeal and the costs thereof could not be enforced until after the disposal of the main appeal. There were no merits in the defendant's appeal. (para 9)

**Case(s) referred to:**

*Chow Yong Hong v. Chow See Lim & Anor [1959] MLJ 23* ***(refd)***

*Hai Yue Hin v. Public Feedmill (M) Sdn Bhd [1997] 4 CLJ 555 CA* ***(refd)***

*Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304* ***(refd)***

*Sime Finance Ltd v. Robin Woon Kim Yan [1997] 2 CLJ Supp 370 HC* ***(refd)***

*Taman Penawar Sdn Bhd v. Khoo Guat Ngoh & Ors [1995] 2 CLJ 443 HC* ***(dist)***

**Legislation referred to:**

Courts of Judicature Act 1964, s. 3

Rules of the High Court 1980, O. 55 r. 12, O. 59 r. 4(1)

*For the appellant - Adrian Hii (Wilson Lim with him); M/s Hamzah, Sulaiman & Partners*

*For the respondent - Thony Dhana; M/s Tony Dhana & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Lau Bee Lan J:**

### Background

**[1]** This is an appeal by the respondent/defendant ("the defendant") against the decision of the learned senior assistant registrar ("SAR") given on 17 September 2007 (encl. 119) wherein she had allowed with costs the preliminary objection of the appellant/plaintiff ("the plaintiff") and ordered that both the respondent's bill of costs both dated 2 August 2006 (encls. 89 and 90) ("the bills of costs") to be taxed after the substantive appeal. They pertain to costs awarded to the respondent by the deputy registrar on two applications (encls. 17 and 21).

**[2]** The brief chronological background facts leading to the appeal are:

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|---|---|---|
| 12 May 2003 | – | Upon a full retrial with evidence from witnesses, the appellant/plaintiff's case was dismissed with costs to be taxed in the Sessions Court. |
| 22 May 2003 | – | The appellant (hereinafter referred to as "the plaintiff" for the background facts) then filed its notice of appeal in this court. |
| 6 June 2003 | – | The plaintiff made an application for stay of execution of the judgment dated 12 May 2003 after a retrial in the Sessions Court. |
| 18 August 2003 | – | The said application for stay of execution in the Sessions Court was dismissed with costs. |
| 10 November 2003 | – | The respondent/defendant (hereinafter referred to as the defendant for the background facts) then files his bill of costs for the action in the Sessions Court. |

1 July 2004 – About one year later, the plaintiff filed a second application, with identical prayers, for stay of execution of the Sessions Court judgment after retrial in the High Court. It was dismissed with costs on 23 August 2004.

24 January 2005 – The bill of costs for the stay of execution in the High Court was taxed at RM4,407. 50 and was upheld upon review on 29 November 2005.

10 February 2006 – Defendant sent a copy of the allocatur for the costs of the application for stay of execution in the High Court to the plaintiff for payment. The plaintiff did not bother to do anything to obtain a stay of execution although it was warned that execution would follow if no payment was made.

15 March 2006 – Execution was carried out by way of writ of seizure and sale.

16 March 2006 – Plaintiff obtained an *ex parte* interim stay of execution of the writ of seizure and sale dated 15 March 2006 from the deputy registrar.

20 March 2006 – Plaintiff filed encl. 17 for an *inter parties* hearing to set aside the writ of seizure and sale dated 15 February 2006 and for other ancillary relief.

3 April 2006 – Defendant filed encl. 21 to set aside the interim court order dated 16 March 2006 obtained *ex parte* by the plaintiff staying the execution of the writ of seizure and sale dated 15 February 2006.

14 April 2006 – Plaintiff's encl. 17 was dismissed with costs and defendant's encl. 21 was allowed with costs. Both application relate to execution of an order where stay of execution of a final judgment after a retrial had been refused.

**Plaintiff's Contention**

**[3]** The plaintiff's preliminary objection is there is a non-compliance of O. 59 r. 4(1) of the Rules of the High Court ("the RHC") in that:

(i) the notice of appeal to a judge in chambers (encl. 33) has not been heard ("the substantive appeal");

(ii) the bills of costs cannot be fixed for taxation at this stage because the court did not order for the costs ("to be paid forthwith"). The cases of *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730, *Chow Yong Hong v. Chow See Lim & Anor* [1959] MLJ 23 and *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304 were cited in support of their proposition (see letter dated 3 April 2007 from M/s Hamzah Sulaiman & Partners annexed as "A" to the written submission of the defendant on encl. 119 dated 17 March 2008 (encl. 114).

(iii) that the application for stay of execution of the Sessions Court judgment after retrial in the High Court which was dismissed with costs on 23 August 2004 was made *vide* a summons in chambers dated 1 July 2004 and is therefore an interlocutory appeal.

**Defendant's Contention**

**[4]** (i) That the application for stay of execution of the Sessions Court judgment after retrial in the High Court should have been made soon after the application was dismissed and the application "would have been by way of an originating motion" and cited *Taman Penawar Sdn Bhd v. Khoo Guat Ngoh & Ors* [1995] 2 CLJ 443.

(ii) The defendant's contention basically is applying the test of "proceeding "in s. 3 of the Courts of Judicature Act 1964 and the meaning of "proceeding" in *Sime Finance Ltd. v. Robin Woon Kim Yan* [1997] 2 CLJ Supp 370, encls. 17 and 21 are not "interlocutory" as they are applications after a final judgment where the commenced action has ended.

**Issue**

**[5]** The issue is whether the costs of encls. 17 and 21 are taxable immediately or should be taxed and paid at the end of the substantive appeal.

**Decision**

**[6]** I find there are no merits in the defendant's appeal. The appeal of the defendant is dismissed with costs to be taxed unless otherwise agreed and the decision of the learned SAR is thereby affirmed.

**Reasons**

**[7]** Order 59 r. 4(1) of the RHC reads:

> 4(1) Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceeding; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

**[8]** The real bone of contention between the parties is as to the nature of the appeal before this court which in my view would affect the issue of when the issue of costs can be enforced. I am of the view that the case of *Taman Penawar Sdn Bhd v. Khoo Guat Ngoh & 6 Ors* [1995] 2 CLJ 443 can be distinguished. One of the issues before the court raised by way of a preliminary objection by the respondent was whether a party can move the court by an OM to set aside a stay of execution ie, whether the applicant company should appeal against the stay of execution rather than apply to set aside the stay of execution. The case decided that when an application for stay is refused by the Subordinate Court, "both parties in the outcome of a stay application may move the higher court through the expeditious process of an originating motion.

**[9]** Learned counsel for the plaintiff submitted that the application for stay of execution of the Sessions Court judgment after a retrial in the High Court which was dismissed with costs on 23 August 2004 was made *vide* a summons in chambers dated 1 July 2004 and the plaintiff did not proceed by way of originating motion which he conceded was an option open to them and if they had done so then if the OM was dismissed, the originating process would have been concluded and the costs could be enforced.

9.1. Order 55 r. 12 of the RHC provides:

> An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.

Since there is no procedure specified as to how an application is to be made after there is a refusal from the subordinate court, in my view I am inclined to agree with argument made on the plaintiff's behalf that he has an option whether to move by way of OM or by way of a summons in chambers. As is correctly submitted in this case the plaintiff has chosen to proceed by a summons in chambers dated 1 July 2004 and since it is an application for stay of execution made under the main appeal it is an interlocutory appeal and the costs thereof cannot be enforced until after the disposal of the main appeal. Support can be found in *Hai Yue Hin (supra)* where at p. 3642 lines 24-32 where the Court of Appeal approved and adopted the interpretation given in the two decisions of *Chow Yong Hong (supra)* and *Ko Ko Ma Pony Horse Centre (supra)* as being the proper and true interpretation of O. 59 r. 4(1) ... It is only when the court thinks it fit to order the costs to be paid by the plaintiff forthwith that it should be so paid, otherwise it should follow the general rule in interlocutory proceedings and be paid only at the conclusion of the action." It is to be noted that in the order dated 23 August 2004 it is ordered by His Lordship Dato' Md. Raus bin Shari, *inter alia*, "ATAS PERMOHANAN perayu yang di tetapkan untuk pendengaran hari ini DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 1 Julai 2004 ... ADALAH DIPERINTAHKAN bahawa permohanan perayu tersebut untuk penggantungan prosiding pelaksanaan atas penghakiman bertarikh 12 Mei 2003 di dalam Mahkamah Sesyen Kuala Lumpur Saman No.8-52-418-90

sementara menunggu pelupusan rayuan perayu di Mahkamah Tinggi ditolak dengan kos" (emphasis added). Since there is nowhere in the said order that the learned judge intended "costs be paid forthwith", I therefore dismiss the appeal with costs and affirm the decision of the learned SAR in allowing the preliminary objection.